

# *America's War on Terror: Rattling International Law with Raw Power?*

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## **I Introduction**

The early 1990s marked the end of the Cold War, which paralysed the United Nations from its inception. The event was a cause for celebration and hope. Following the historic Security Council Summit Meeting of January 1992, the then Secretary-General of the United Nations, Boutros Boutros-Ghali, spoke of a growing conviction

among nations large and small, that an opportunity has been regained to achieve the great objectives of the UN Charter – a United Nations capable of maintaining international peace and security, of securing justice and human rights and of promoting, in the words of the Charter, ‘social progress and better standards of life in larger freedom’.<sup>1</sup>

The spirit of this bold and idealistic statement had been echoed two years earlier by former President George H W Bush Senior’s statement to the United Nations General Assembly as United States and coalition forces were gathering to push Saddam Hussein’s Iraqi army out of Kuwait:

We have a vision of a new partnership of nations that transcends the Cold War. A partnership based on consultation, cooperation, and collective action, especially through international and regional organisations. A partnership united by principle and the rule of law ... A partnership whose goals are to increase democracy, increase prosperity, increase the peace, and reduce arms.<sup>2</sup>

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<sup>1</sup> *Report of the Secretary General on the Work of the Organisation*, UN GAOR, 47th Sess, UN Doc A/47/277, S/24111 (1992) [3].

<sup>2</sup> George H W Bush, ‘The UN: World Parliament of Peace’, Address to the United Nations General Assembly’, (1 October 1990), in 1 US Dep’t St Dispatch (1990) 151, 152.

Over a decade after 'Operation Desert Storm' and in the aftermath of the terrorist attacks of September 11, 2001, a newly assertive United States has placed considerable strain on the existing international legal rules governing the use of force by reserving a right to use unilateral force and, of course, demonstrating that practically. Reacting to the legalities and justifications surrounding 'Operation Iraqi Freedom', Professors Richard Falk and David Kreiger observe:

There are two main ways to ruin the UN: to ignore its relevance in war/peace situations, or to turn it into a rubber stamp for geopolitical operations of dubious status under international law or the UN Charter. Before September 11, Bush pursued the former approach; since then – by calling on the UN to provide the world's remaining superpower with its blessings for an unwarranted war – the latter.<sup>3</sup>

The crusade against terror is not a sole US enterprise; many of its fears are shared by a large majority of the international community. The crusade should however not be allowed to numb states and the broader international community to the need of international rule of law and the utility of international law as central pillars of the international community. The attempt by the

Bush administration to introduce a new principle of international law permitting 'pre-emptive strike' by a nation against another, solely at its own discretion, represents a quantum, and highly dangerous, innovation. Were such a principle to prevail, we would have reversed decades of advances, modest but hard won, toward peace-making and returned to an era of dominance through might.<sup>4</sup>

The 'War on Terror' is a noble crusade that seeks to counter the rise of international terrorism fuelled by a combination of resurgent religious extremism, well-financed and co-ordinated terrorist organisations, and the availability of cheap weapons technology. However the pugnacity demonstrated by the Bush Administration in facing the threat is a source of concern. In profound insight, in 1999, Hubert Vedrine, then Foreign Minister of France, coined a new term describing the United States as a 'hyper-puissance', or 'hyper-power'.<sup>5</sup> The term wasn't an expression of awe but rather a fear of the capacity of the United States to resort to unilateralism in view of its dominant military and economic power. Perhaps the prophecy is coming true with events subsequent to the September 11 attacks, painting a disturbing picture.

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<sup>3</sup> Richard Falk and David Kreiger, 'Subverting the UN', *The Nation*, 4 November 2002, 2002 WL 2210961.

<sup>4</sup> See generally David Krieger, 'The Bush Administration's Assault on International Law' in Richard Falk and David Krieger (eds), *The Iraq Crisis and International Law* (2003).

<sup>5</sup> 'To Paris, US Looks Like a "Hyperpower"', *International Herald Tribune*, 5 February 1999, 5.

This Article seeks to sketch generally the issues that America's 'for us or against us' attitude in the crusade against terror raises. Underpinning this commentary is the author's conviction that the US stance will have injurious consequences for world public order if the existing international system based on a tenuous rule of law-based framework is allowed to morph into a rule of might. The author acknowledges that there are many legal and political issues regarding post September 11 United States actions, but these have been analysed comprehensively by the author elsewhere.<sup>6</sup> In this Article, the author deliberately adopts a narrow perspective focusing on the danger that the overall tenor of United States' actions portends.

## II The UN and Terrorism: An Awkward Embrace

Modern forms of terrorism began in earnest in the 1960s with the world emerging from colonialism and state-sponsored racism.<sup>7</sup> From Asia to Africa and the Middle East, many states sought freedom from foreign control and/or domination. In the face of vastly superior, well-equipped and well-financed imperial armies, nationalist and anti-colonialist organisations resorted to terror violence, attacking civilian targets to instil a sense of terror in the white community and white-dominated governments that ruled by force. With few members, limited firepower, and comparatively few organisational resources, these groups opted to rely on dramatic, often spectacular, bloody acts of violence to attract attention to themselves and their cause. In this era '... "terrorism" was used to describe the violence perpetrated by Indigenous nationalist, anti-colonialist organisations that arose throughout Asia, Africa, and the Middle East in opposition to continued European rule.'<sup>8</sup> Many countries owe their independence at least in part to nationalist movements that used terrorism. Various disenfranchised or exiled nationalist minorities also embraced terrorism as a means to draw attention to their plight and generate international support for their cause. This modus operandi did work

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<sup>6</sup> Jackson Nyamuya Maogoto, 'Rushing to Break the Law? "The Bush Doctrine" of Pre-Emptive Strikes and The UN Charter Regime on The Use of Force' (2003) 7 *University of Western Sydney Law Review* 1; Jackson Nyamuya Maogoto, 'War on The Enemy: Self-Defence and State-Sponsored Terrorism' (2003) 4 *Melbourne Journal of International Law* 406; Jackson Nyamuya Maogoto, 'New Frontiers, Old Problems: The War on Terror and the Notion of Anticipating the Enemy' (2004) 11, *Netherlands International Law Review* 1; Jackson Nyamuya Maogoto, 'Countering Terrorism – From Wiggled Judges to Helmeted Soldiers? An Evaluation of the Law Enforcement and Conflict Management Approaches' (2005) 6(2) *San Diego International Law Journal* (forthcoming).

<sup>7</sup> Abraham D Sofaer, 'Judicial Responses to Terror: Issues, Problems and Prospects' (2002) *American Society of International Law Proceedings* 250, 255.

<sup>8</sup> Bruce Hoffmann, *Terrorism* (2004) Microsoft Encarta Online Encyclopaedia 2004, <<http://encarta.msn.com>> at 20 May 2004.

and occasionally paid handsome dividends.<sup>9</sup>

Abraham D Sofaer observes that

[n]o international consensus then existed that these terrorist acts, including the killing of civilians, were unlawful. Politically motivated violence had a favoured position in international affairs, including international law. The United Nations General Assembly debates on terrorism in 1972 illustrate this point.<sup>10</sup>

In the aftermath of the killings by Japanese terrorists sympathetic to the Palestinian cause at Lod Airport, Israel, and the murders by PLO terrorists of the Black September organisation of members of the Israeli Olympic team in Munich, Secretary-General Waldheim called on the Assembly to place on its 1972–73 agenda an item entitled: 'Measures to prevent terrorism and other forms of violence which endanger or take innocent human lives or jeopardise fundamental freedoms.' The item ran into a storm of protest. 'During the debates that followed that and later proposals, it became clear that many states regarded acts of terror as lawful when undertaken by persons deprived of basic human rights, dignity, freedom, or independence from foreign occupation.'<sup>11</sup>

Ideological and geopolitical differences between states regarding the permissibility of violence in various political contexts ensured that no broad generic approach would be taken and obscured the fact that numerous states and organisations resort to clearly impermissible violence when convenient to or desirable for their objectives. The growing lethality and regularity of terrorist acts, however, transformed the matter as ideological motivations increasingly replaced revolutionary goals. This convinced the international community of the need to reach agreement that certain acts were criminal in all circumstances and should confer jurisdiction on all states to prosecute them, or alternatively an obligation to extradite persons charged with such acts to other states for prosecution.

In order to mobilise consensus, the international community adopted a piecemeal approach to combating terrorism, choosing to target very specific acts of terrorism, occurring in specific situations, circumstances or places and generally providing for extradition and prosecution

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<sup>9</sup> Ibid. For example, Dr Bruce Hoffmann notes that: 'The murder of 11 Israeli athletes at the 1972 Olympic Games provides one of the most notorious examples of terrorists' ability to bring their cause to world attention.' He goes on to observe that:

The PLO effectively exploited the publicity generated by the Munich hostage taking. In 1974 PLO leader Yasir Arafat received an invitation to address the UN General Assembly and the UN subsequently granted special observer status to the PLO. Within a decade, the PLO, an entity not attached to any state, had formal diplomatic relations with more countries (86) than did Israel (72) – the actual, established nation-state. The PLO would likely never have attained such recognition without the attention that its international terrorist campaign focused on the plight of Palestinians in refugee camps.

<sup>10</sup> Sofaer, 'Judicial Responses to Terror', above 7, 255.

<sup>11</sup> Ibid 255.

regimes. The first terrorism conventions related to aviation security and followed a spate of hijackings in the 1970s. They covered hostage taking, internationally protected persons (including diplomats), and nuclear material. In the 1980s, the focus was on maritime terrorism, following the hijacking of the Achille Lauro. It was not until December 1985 that the UN General Assembly finally condemned ‘unequivocally ... as criminal, all acts, methods and practices of terrorism.’<sup>12</sup> Even that resolution, however, reaffirmed each people’s inalienable right to self-determination and the legitimacy of struggles against colonial and racist regimes and other forms of alien domination. Many state representatives affirmed the right to engage in all necessary actions in these struggles. Subsequently, three further conventions, on plastic explosives, terrorist bombings and terrorist financing, were negotiated in the 1990s wrapping up efforts under the aegis of the UN to address and combat terrorism in the 20<sup>th</sup> century.<sup>13</sup>

The law enforcement approach initially predominated counter-terrorism responses. This approach considers terrorist events as purely criminal acts to be addressed by the domestic criminal justice system and its components. It *ensures due process* and is a more precise instrument for meting out *individualised justice*. Despite the clear-cut positives that the domestic legal enforcement framework offers, it has proved to be inadequate. In the mid-1980s States (notably Israel and the United States) begin to suggest that terrorist acts might be approached from a conflict management perspective, rather than exclusively from a law enforcement viewpoint. The belief is that only the use of armed force will result in the degree of decisive action that will minimise the likelihood that offenders will go unpunished. It is argued that terrorists must be seen, not as criminals, but as persons jeopardizing national security.<sup>14</sup>

With the end of the Cold War, acts generally described as ‘terrorism’ proliferated in frequency and severity. The rise of globalisation and religious extremism on one hand, and the increasing accessibility and availability of weapons and technology on the other enabled well-financed and organised terrorist organisations to transform themselves into global outfits with greater reach and lethality.<sup>15</sup> The appeal of terrorism as a low-cost, relatively low-risk, activity with possibilities of high yield in terms of publicity, weakening of the victim or infliction of harm has always been

<sup>12</sup> GA Res 40/61, 40<sup>th</sup> sess, 108<sup>th</sup> plen mtg, [1], [6], UN Doc A/RES/40/61 (1985).

<sup>13</sup> Over the last 30 years, the international community has negotiated 12 conventions covering terrorism.

<sup>14</sup> Emanuel Gross, ‘Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as An Act of Self-Defence: Human Rights Versus the State’s Duty to Protect Its Citizens’ (2001) 15 *Temple International & Comparative Law Journal* 195, 202; see also Abraham D Sofaer, ‘The Sixth Annual Waldemar A Solf Lecture in International Law: Terrorism, the Law, and the National Defence’ (1989) 126 *Military Law Review* 89, 89–90.

<sup>15</sup> In relation to the rise of terrorism, see Peter Chalk, *West European Terrorism and Counter-Terrorism: The Evolving Dynamic* (1996) (specifically chapters 2 and 4).

the primary magnet to terror outfits.<sup>16</sup> Globalisation and technology was quickly enhancing the capabilities of the outfits. With less confrontation and more co-operation between states in the post-Cold War era, terrorism soon gained the recognition that Cold War ideological and political squabbles prevented it from gaining – a pernicious and underestimated threat to international peace and security.

There is no doubt that terrorism is an evil that States should combat aggressively. Terrorism aims at killing the innocent and the unarmed. It has no ethics or conscience. Nonetheless, it should not be forgotten that countries have many tools they can use in their fight against terrorism including covert actions, and a variety of economic sanctions against a state or group that supports terrorists.<sup>17</sup> These sanctions include freezing assets, denying credit or investment funds to countries supporting terrorists, and working with multilateral banks to block loans.

The author is inclined to concur with Joseph Thomas's observation that the rise and threat posed by international terrorism is the third world war which is upon us in all its ferocity. It may be a war without end, but it should be fought with courage.<sup>18</sup> However it is his belief that: '[t]his war calls for merciless punitive action, not thoughtless murders',<sup>19</sup> with which the author takes issue. Massive military force, however selectively and carefully carried out, will always lead to mistakes and the mistakes will inevitably be counted in numerous unnecessary deaths of innocent civilians. As Professor Christopher Blakesley cautions: 'Care must be taken to ensure that international and domestic action taken to obtain justice and to prosecute perpetrators does not fall into the same trap that ensnared those who committed the crimes. If we allow ourselves to descend to simple vengeance, we are lost.'<sup>20</sup>

Terrorists are elusive and more so when States turn their back on their international responsibilities and obligations and grant them safe havens and support. However, these failings do not justify a resort to vigilante justice. Unilateral solutions fuelled by nationalistic agendas are bound to tear the fabric of restraint that is central to the international regime on the use of force. It is all too easy to reach the simple solution of eliminating the enemy but much harder practically to implement without the use of raw military power and thus a move to centralise power as a medium of international relations. Such a move ensures that inevitably the international rule of law becomes part of the casualty toll.<sup>21</sup>

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<sup>16</sup> Paul Wilkinson, 'Terrorist Targets and Tactics: New Risk to World Order' in Alison Jamiesone (ed), *Terrorism and Drug Trafficking in the 1990s* (1994) 181.

<sup>17</sup> Sofaer, 'Judicial Responses to Terror', above 7, 251.

<sup>18</sup> Ravindra V Parasnin, *Third World War; The Rediff Special* (2001) <<http://www.rediff.com/news/2001/sep/12spec.htm>>.

<sup>19</sup> *Ibid.*

<sup>20</sup> Christopher L Blakesley, 'Ruminations on Terrorism & Anti-Terrorism Law & Literature' (2003) 57, *University of Miami Law Review* 1041, 1145–6. (4, July 2003)

<sup>21</sup> *Ibid* 1139–40.

### III Changing Gear without Engaging International Law

The devastating consequences of the attacks of September 11 led President George Bush Jr to declare a 'war' on terrorism. The first stage of this war was a full-scale military operation in Afghanistan, which destroyed the Taliban and Al Qaeda as fighting forces, and replaced the Taliban regime with an internationally approved transition government. But the United States was soon squandering the legal and political capital when it turned its focus on Iraq. 'Operation Iraqi Freedom' generally lacked support by the UN and most sovereign states including some key traditional US allies.

The rapid fizzling of international support for the 'Operation Iraqi Freedom' despite the abundance of the same when the United States launched 'Operation Enduring Freedom' against Afghanistan was premised on what was viewed as a lack of appreciation by the United States of the complications to the international system that this engendered. This was more so considering that the United States had flagged that it was embarking on a new and dramatically different policy in dealing with terrorism than it has followed for many years.<sup>22</sup>

In his first State of the Union address after the September 11 terrorist attacks, Mr Bush's bellicose remarks regarding the 'axis of evil' raised international concerns that the war on terrorism may spread in terms of geography and nature. The international community (including United States' allies)

... reacted with alarm and repudiation, fearing that the president's rhetoric signalled a unilateral escalation of global tension. They also objected to the overall mood of the address, and in particular, the pugnacious way in which President Bush promised to deal with those who threatened American security.<sup>23</sup>

One-by-one foreign leaders scolded the United States for its defiant, 'go-it alone' attitude.<sup>24</sup> Sensing the Bush administration's heightened

<sup>22</sup> Sofaer, 'Judicial Responses to Terror', above 7, 254.

<sup>23</sup> Allison Ehlert, 'Iraq at the Apex of Evil' (2003) 21 *Berkeley Journal of International Law* 731, 736. See also Massimo Calabresi, 'The Axis of Evil: Is It For Real? What Bush is Really Saying when he talks Tough about Rogue States', *Time*, 11 February 2002, 30 (stating that, 'As a phrase, "axis of evil" is misleading. There is no alliance among the three countries Bush chose to label. '); Anna Quindlen, 'The Axis of Re-election', *Newsweek*, 4 March 2002, 64 (remarking that "the choice of that word to describe the three nations the president singled out seemed peculiar, even bizarre. Bad as they may be, there's little to link them. "); Elisabeth Bumiller, 'Axis of Debate: Hawkish Words', *New York Times*, 3 February 2002, Week in Review 5; Suzanne Daley, 'Many in Europe Voice Worry US Will Not Consult Them', *New York Times*, 31 January 2002, A12.

<sup>24</sup> See e.g. Steven Erlanger, 'German Joins Europe's Cry That the US Won't Consult', *New York Times*, 13 February 2002, A18; Dave Clark, 'France's Vedrine Attacks "Simplistic" US Foreign Policy', *Agence France-Presse*, 6 February 2002, available at LEXIS, News Library; Ian Black, John Hooper, and Oliver Burkeman, 'Bush Warned Over 'Axis of Evil': European Leaders Insist Diplomacy is the Way to Deal with Three Nations Singled out by America', *The Guardian* (London), 5 February 2002, 13.

interest in Iraq, the EU, China, Russia, and Germany warned the United States not to attack Iraq without first working through international diplomatic channels.<sup>25</sup> The appeals by the international community however fell on deaf ears. This was not surprising since President Bush's September 12, 2002 address to the UN General Assembly, a year after the September 11 bombings, had set the terms of the debate.<sup>26</sup> In that address, '[r]emarkably, Bush succeeded both in flashing his multilateralist credentials and in portending the death of multilateralism if the UN failed to follow the American lead.'<sup>27</sup>

It wasn't lost on the international community that the Bush Administration was increasingly gravitating towards unilateralism and a nationalistic agenda evidenced by the administration's rejection of several international agreements resulting in feverish charges, especially from allies abroad, that the United States was behaving unilaterally.<sup>28</sup>

The administration's critics argued that American unilateralism endangered the global cooperation that is the only means through which common problems can be solved and common interests advanced. The uncompromising rhetoric used by the President and other [US] government leaders in describing how the United States would confront Iraq – with or without allied support – provided more ammunition for those who denounced the Bush administration's perceived unilateralism.<sup>29</sup>

The belligerence in the rhetoric of the Bush administration (especially in light of United States' military might) painted a troubling picture of not allowing its agenda to be deterred or diluted by the strictures of international law or the preferences of the international community. If allies agree with the United States' position, they should join the crusade; if not, the implication is that they are soft on terrorism and – of course for states outside the close circle – sympathisers.

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<sup>25</sup> Black, Hooper and Burkeman, 'Bush Warned Over 'Axis of Evil'', above n 24; Steven Erlanger, 'Russian Aide Warns US Not to Extend War to Iraq', *New York Times*, 4 February 2002, A10; Martin Fletcher, 'Stay out of Iraq, Patten tells America', *The Times* (London), 20 February 2002, available at LEXIS, News Library; Roland Watson, 'President Jiang tells Bush not to Bully Iraq', *The Times* (London), 22 February 2002, available at LEXIS, News Library.

<sup>26</sup> Address to the United Nations General Assembly in New York City, 38 Weekly Comp Pres Doc 1529 (12 September 2002).

<sup>27</sup> Ehlert, 'Iraq at the Apex of Evil', above 23, 755.

<sup>28</sup> *Ibid* 765.

<sup>29</sup> *Ibid*.



## IV Marginalising the UN and International Law?

It is abundantly clear that the push for a state-centric determination on the use of lethal military force to counter terrorism is exerting tremendous stress on international cooperation and goodwill and contributing to mounting anti-American sentiment. It is significant that in a break with the past, a justification under law was not part of the Bush Administration's public position when it began discussing an invasion of Iraq.<sup>30</sup> Professor Mary Ellen O'Connell observes that: 'This is one of the rare occasions since the adoption of the UN Charter that the United States has been so disinterested in international law as to not provide an explanation as to how a major use of armed force would comply with the law.'<sup>31</sup> Professor O'Connell then sums up the matter thus:

The significance of this is not that the United States has always acted consistently with international law and now suddenly it is not. The United States has plainly violated international law on the use of force in the past. The difference is that now the prevailing view sees no need to offer explanations. The United States need not show how it has acted consistently with the principles of the community. The United States is above the law. That is a significant departure from the past that may well have serious negative consequences for future legal restraints on the use of force.<sup>32</sup>

In the invasion of Iraq, US planners give little indication that they were concerned with the law of self-defence:

In the past the United States has sought to characterise its uses of force as within the international rule of law – even if that meant manipulating facts as in the cases of Vietnam and Grenada. The United States has officially argued its uses of force were lawful. The invasion of Iraq, however, presents a significant new development in which it seems some United States foreign policy planners apparently believe that the United States has a privileged, exceptional position in international relations and that puts it above international law.<sup>33</sup>

The stance that no multilateral organisation authorisation or other justification under law to invade Iraq was necessary will have profound consequences if permitted to be the guiding principle of the United States in its crusade against terror. The most powerful country on earth cannot afford to be solely preoccupied with self-preservation.<sup>34</sup> Undoubtedly, the

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<sup>30</sup> One of the most complete accounts of what invasion planners had in mind as of Spring 2002 is found in Thom Shanker and David E Sanger, 'US Envisions Blueprint on Iraq Including Big Invasion Next Year', *New York Times*, 28 April 2002, 1.

<sup>31</sup> Mary Ellen O'Connell, 'American Exceptionalism and the International Law of Defence' (2002) 31 *Denver Journal of International Law & Policy* 43, 44.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, 54.

<sup>34</sup> George Soros, 'Bush's Inflated Sense of Supremacy', *Financial Times*, 13 March 2003, 13.

United States enjoys a position of preponderant military, economic and political might and privilege in the international community. 'America is no mere international citizen. It is the dominant power in the world, more dominant than any since Rome. Accordingly America is in a position to reshape norms, alter expectations and create new realities.'<sup>35</sup> But this surely does not entail tearing apart the international framework and unravelling many decades of hard won battles to discipline sovereign excesses. If this be so, Professor Mary Ellen O'Connell notes that:

Allowing the United States to move to a position above the law will have repercussions for the law. Those repercussions will unlikely be the ones the United States wants. The United States wants an orderly world under the rule of law for everyone, but some also want the United States to have a right to pick and choose the rules it obeys. This is not how law works. Law is based on a psychological element of belief and commitment. When these are absent, there can be no law. If the United States breaks this fiction and declares itself above the law, it will help break down the commitment to law generally in the international community.<sup>36</sup>

Resort to force, even when lawful, requires great care; mistakes or excessive collateral damage can undermine its effectiveness. 'While the United States may act unilaterally in its self-defence, it must be prepared to defend its actions or to admit and pay for its mistakes.'<sup>37</sup> But such mistakes (likely to be colossal as Iraq demonstrates) will result in undermining rather than furthering the crusade against terrorism. Opponents of an independent right for states to determine the use of military force outside the dictates of the UN Charter as a counter measure against terrorism criticise the proposition as an imprudent expansion of the legitimate use of force with limitless potential for misuse. These opponents echo the fears expressed by the International Court of Justice over fifty years ago in the Corfu Channel case:

[The ICJ] can only regard the alleged right of intervention as the manifestation of a policy of force such as has in the past given rise to most serious abuses and such as cannot find a place in international law. It is still less admissible in the particular form it would take here – it would be reserved for the most powerful states.<sup>38</sup>

UN Secretary-General Kofi Annan echoed this position in 1999 when he commented that 'enforcement actions without Security Council authorisation threaten the very core of the international security system

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<sup>35</sup> Charled Krauthammer quoted in Detlev F Vagts, 'Hegemonic International Law' (2001) 95 *American Journal of International Law* 843.

<sup>36</sup> O'Connell, 'American Exceptionalism', above 31, 57.

<sup>37</sup> Sofaer, 'Judicial Responses to Terror', above 7, 259.

<sup>38</sup> *Corfu Channel (UK v Albania)*, (Merits) [1949] ICJ 4, 34.

founded on the Charter of the United Nations. Only the Charter provides a universally accepted legal basis for the use of force.<sup>39</sup> It may be prudent for self-defence not to expand so rapidly that it erases the preclusion of unilateral recourse to armed force. After all, as Professor Schachter observes, '[t]he absence of binding judicial or other third-party determinations relating to the use of force adds to the apprehension that a more permissive rule of self-defence will open the way to further disregard of the limits on force.'<sup>40</sup> As Professor Byers and Simon Chesterman observe:

a select group of states (such as Western liberal democracies, or perhaps the United States alone) agreeing on criteria [for intervention] amongst themselves – would seriously undermine the current system of international law: It would also greatly undermine the position of the United Nations as an effective organisation in the field of peace and security, after the decade in which, despite some obvious failures, it achieved more than in the previous half-century.<sup>41</sup>

The Bush Doctrine, perceiving the failure of deterrence to inhibit terrorists and 'rogue' states that possess the will and the means to wreak catastrophic destruction, avers that the terrorist threat has become an overriding threat to national survival that trumps existing international law. The United States feels it cannot afford to let terrorists have any safe harbour from which to craft a future catastrophic attack on America.<sup>42</sup>

The United States is forceful in averring that '[t]he war on terror will not be won on the defensive.'<sup>43</sup> What the United States seems to be ignoring or giving scant attention to is the fact that

the Article 2(4) prohibition is not a one-sided provision that hampers only the United States policy; it applies to all members of the United Nations. Accordingly, an erosion of the prohibition on the use of force enables not only the United States, but also all other states to use force more freely.<sup>44</sup>

United States policymakers, perhaps considering other states too weak to exploit the new principles it seeks to write into the rule book for the use of force, may be willing to tolerate this situation.

<sup>39</sup> *Report of the Secretary General on the Work of the Organisation*, UN GAOR, 54th Sess, Supp No 1, [66], UN Doc A/54/1 (1999).

<sup>40</sup> Oscar Schachter, *International Law in Theory and Practice* 145 (*Developments in International Law Series*, Vol 13, 1991).

<sup>41</sup> Michael Byers and Simon Chesterman, 'Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law' in Holzgrefe & Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) 202.

<sup>42</sup> Peter McLain, 'Settling the Score with Saddam: Resolution 1441 and the Parallel Justifications for the Use of Force Against Iraq' (2003) 13 *Duke Journal of Comparative and International Law* 233, 280.

<sup>43</sup> George W. Bush, *Graduation Address at the US Military Academy* (1 June 2002), <<http://www.whitehouse.gov/news/releases/2002/06/print/20020601-3.html>> at 31 August 2002.

<sup>44</sup> McLain, 'Settling the Score with Saddam', above 42, 285–6. See also Christine Gray, *International Law and the Use of Force* (2000) 23 ('the language of states in their interpretation and application of the UN Charter could operate as a precedent and later be invoked against them.').

Though the military actions in Afghanistan and Iraq have from a technical point of view 'been fought and won, a battle still rages over the legitimacy of the United States' actions under international law. As the world hegemon, the actions of the United States receive a great deal of attention.<sup>45</sup> The United States chose not to act within the parameters of international law when it invaded Iraq without proper authority leaving the international community angry and frustrated. It did not help that the action occurred in the shadow of lowered world opinion of the United States due to its unilateral moves regarding the environment and missile defence.<sup>46</sup> The invasion of Iraq served only to reinforce the fears that the international community had of a hyper-power determined to have its way whether through law or simply raw power.

The anger of the international community was not based on any support for Saddam regime which the international community was well aware supported terror in one form or another. Rather it was premised on the United States' determination to invade Iraq based on faulty and dodgy intelligence which served to undermine the United States' claim of a right to act unilaterally against Saddam's regime on behalf of the interests of the international community. In essence the United States seemed fixated with the need to get rid of the murderous regime – not a bad mindset – but disturbing when it sought to wrap up its political agenda together with the interests of the international community. The spill over effect is that it opened the door to other countries to justify violating the law in the same manner – by tying the interests of the international community together with national foreign policy goals. Thus, this move by the United States could unwittingly establish a dangerous precedent.

## V The Future

The events of September 11 establish that terrorism poses the most serious threat to international order and global human rights in the 21<sup>st</sup> century. Terrorism also represents a grave crime under international law. The war on terror has the UN Charter regime on the use of force enrolled in an era of change. Within the United Nations regime – the system of collective security, self-defence is subject to restrictions (in other words is finite). The 'Bush Doctrine' and similar doctrines or justifications are running against the grain of Article 2(4). Considering that an amendment to the UN Charter is near impossible, a change in customary law might be a way. As Professor M Bothe points out, '[a] usual procedure to modify

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<sup>45</sup> Jason Pedigo, 'Rogue States, Weapons of Mass Destruction, And Terrorism: Was Security Council Approval Necessary for the Invasion of Iraq' (2004) 32 *Georgia Journal of International and Comparative Law* 199, 201.

<sup>46</sup> Michel Martin, *A Greedy Bully*, (8 September 2002) ABC News <[http://abcnews.go.com/sections/nightline/DailyNews/foreign\\_journalists020908.html](http://abcnews.go.com/sections/nightline/DailyNews/foreign_journalists020908.html)> at 18 September 2003.

customary law is to break it and to accompany the breach by a new legal claim.<sup>47</sup> The case for a change of the restrictive concept of pre-emptive self-defence is made by the National Security Strategy:

Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.<sup>48</sup>

The argument that a state cannot wait to absorb a potential legal attack before acting is not new. Indeed, the traditional approach has always had the drawback of depriving a potential victim of the possibility to choose the most advantageous moment to fight a danger which may be extreme. It has been used by Israel to justify a number of incursions into the territory of its neighbours, and has been rejected by the Security Council.<sup>49</sup> The prohibition of the use of force, including the prohibition of anticipatory self-defence, has developed in international practice and doctrine despite the awareness of this drawback. 'Does President Bush's National Security Strategy constitute a step in this direction?'<sup>50</sup> Any new rule to be created would have to give an adequate answer to many thorny questions. Professor M Bothe raises some of these questions thus:

How to define and limit a possibly expanded right of self-defence? How serious must the threat be? Is possession of weapons of mass destruction enough? Who is threatened and who may attack? What about the possession of nuclear arms by India, Pakistan, North Korea and Israel? What precisely distinguishes them (if there is a difference), in legal terms, from Iraq? What does 'harbouring' terrorists mean? There must be knowledge. But if there is, what kind of effort is a state required to make in order not to be considered as harbouring terrorists?<sup>51</sup>

Satisfactory answers to these questions are not at hand. All too easily, a standard of reasonableness boils down to subjectivity and speculation. The National Security Strategy seems to recognise the dilemma, in particular the risk of abuse: 'nor should nations use pre-emption as a pretext for aggression.'<sup>52</sup> This sentence is followed, however, by a somewhat enigmatic

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<sup>47</sup> Michael Bothe, 'Terrorism and the Legality of Pre-Emptive Force' (2003) 14 *European Journal of International Law* 227, 233.

<sup>48</sup> George W Bush, 'The National Security Strategy of the United States of America' [15] (17 September 2002) <<http://www.whitehouse.gov/nsc/nss.pdf>> at 2 August 2003; *AP Newswires*, (20 September 2002), *Westlaw*.

<sup>49</sup> See, for instance, SC Res 487 of 19 June 1981 relating to the Israeli attack against the nuclear reactor in Baghdad

<sup>50</sup> Bothe, 'Terrorism and Force', above 47, 233.

<sup>51</sup> *Ibid* 234.

<sup>52</sup> Bush, 'National Security Strategy', above n 48.

postulate: 'Yet in an age where the enemies of civilisation openly and actively seek the world's most destructive technologies, the United States, and thus cannot remain idle while dangers gather',<sup>53</sup>

The prickly issue is whether this seems to imply a differentiation between (other) 'nations' and the United States, and thus seek to create a different yardstick for the world's sole superpower. An essential argument for maintaining the restrictive concept is the problem of vagueness and the possibility of abuse since this is the greatest vulnerability of the prohibition of the use of force. The impossibility of placing any legal limit on the exception means that the validity of the prohibition of the use of force itself will be in jeopardy.

The attempt to create a rule which is unable to give a workable definition of permissible force might end in the abolition of the prohibition of the use of force altogether, as previously occurred. This would mean destroying one of the most important and salutary cultural and political achievements of the 20<sup>th</sup> century. That danger is all the more real as the rule prohibiting the use of force is particularly vulnerable for another reason as well. This rule was not really developed by state practice. There has never been a consistent practice of abstention from the use of force. What changed after World War I was the reaction of relevant actors against the use of force.

If we want to maintain international law as a restraint on the use of military force, we should very carefully watch any attempt on the part of opinion leaders to argue that military force is anything other than an evil that has to be avoided. The lessons of history are telling. If we revert to such broad concepts, such as the just war concept, to justify military force we are stepping on a slippery slope, one which would make us slide back into the 19<sup>th</sup> century when war was not illegal.

It is important that states remember that despite the weaknesses and perceived failings of the UN in dealing with terrorism, the UN is not sitting on its hands. Even before the September 11 attacks, when the UN General Assembly adopted the Millennium Declaration it among other things urged a concerted action against international terrorism by states as well as their accession to all relevant international conventions.<sup>54</sup> About a year later, on 28 September 2001, acting under Chapter VII of the UN Charter, the Security Council adopted Resolution 1373, reaffirming its unequivocal condemnation of September 11 attacks.<sup>55</sup> The resolution also established the Counter-Terrorism Committee to monitor the implementation of Resolution 1373 by all States and spearhead attempts to increase the capability of States to fight terrorism. Shortly thereafter,

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<sup>53</sup> Ibid.

<sup>54</sup> United Nations Millennium Declaration, GA Res 55/2. 8 September 2000, para 9, <<http://www.un.org/millennium/declaration/ares552e.htm>> at 20 April 2004.

<sup>55</sup> UN SCOR, 56<sup>th</sup> Sess, 4370<sup>th</sup> mtg, UN Doc S/RES/1368 (2001).

at the behest of the Secretary-General in October 2001 the Policy Working Group on the United Nations and Terrorism was established. Its purpose has been to identify the longer-term implications and broad policy dimensions of terrorism for the United Nations and to formulate recommendations on the steps that the United Nations system might take to address the issue.

It may well be that the international community is committed to reshaping the paradigm on the use of force to counter terrorism and will one day accept some instances of pre-emptive use of force. This, it is submitted, is a much safer approach to the interpretation and development of the *jus ad bellum* than loosening any real restraint by boiling it down to a rule of reason – a self-destructive mechanism for the prohibition of the use of force. While there are serious doubts about the wisdom of the traditional rule which strictly limits anticipatory self-defence, practicable substantive legal restraints on the use of pre-emptive force are not readily available. Loosening these limits without setting out workable limits is dangerous.

## VI Conclusion

Despite the horror of September 11, the ‘Bush Doctrine’, if taken to its logical conclusion, is too all-encompassing to conform to even an expansive reading of the UN Charter. No doubt the September 11 terrorist attacks reinforced the proposition that the UN Charter system is ill-equipped to deal with contemporary security threats. However part of the problem is a result of the Cold War and the obstructionist politics that accompanied it.<sup>56</sup> Despite instances of resort to military action to counter terrorism in the Cold War, the actions were often shrouded in a jumble of half-truths not helped by a confusing mish-mash of legal justifications. The end result is that the illusion of self-defence was (and still is) used and misused preventing the evolution of any meaningful state practice and *opinio juris* thus retarding the development of meaningful international discourse.

Antiterrorism efforts must ultimately be judged by whether they prevent attacks. Any conceivable deterrent effect of criminal prosecutions of low-level conspirators is lessened by the fact that they take years to complete and may take place after additional attacks. Law enforcement activity cannot be expected to shut down terrorist organisations operating in hostile and uncooperative states ...<sup>57</sup>

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<sup>56</sup> Pedigo, ‘Rogue States, Weapons of Mass Destruction’, above n 45, 226. See also Thomas M Franck, ‘When, If Ever, May States Deploy Military Force Without Prior Security Council Authorisation?’ (2001) 5 *Washington University Journal of Law & Policy* 53.

<sup>57</sup> Sofaer, ‘Judicial Responses to Terror’, above n 7, 258.

It is a reality that criminal prosecutions are generally ineffective in deterring fundamentalist terrorist groups able to recruit individuals willing to sacrifice their lives in suicide bombings. These terrorists are crazed killers, as prepared for sacrifice as good soldiers.<sup>58</sup> However, in the face of the ever present reality that 'Al Qaeda and similar organisations limit the damage any individual can inflict by functioning in loose-knit cells',<sup>59</sup> the fight against terrorism cannot be won purely by force or by causing the other side an unacceptable rate of casualties. Professor Christopher Blakesley cautions:

International and domestic law equip us to extricate ourselves from the 'infernal dialect' of violence; they provide the means whereby we may avoid accepting or participating in the oppression or the slaughter of innocents, even by our own acquiescence. It is error of the highest order to accept the ideologue's argument that, because some nations or rebel groups participate in oppression or other terror-violence, it is inevitable and therefore necessary to combat it with like conduct. It is practical and necessary to alter this vision. To commit evil acts because of perceived or even actual evil acts perpetrated by the object of our acts is to accept the evil as ours and to become evil. Self-defence under the rule of law does not include the use of innocents as tools. We must re-establish the vision of a world made up of human beings controlled by the rule of law and morality, not by raw power.<sup>60</sup>

The current climate dictates that there is a need 'to realign the existing rules on the use of force to match the altered international security environment and yet maintain meaningful limits on the use of force.'<sup>61</sup> Viable solutions can be reached but only by States maintaining the centrality of the UN even in the face of unconventional threats.

The UN is well aware that it will remain relevant if it explores and develops new avenues for dealing with the threat of international terrorism. Obviously measures from another era that simply impose a limit on the use of force that frustrates a nation's ability to defend itself will result in the UN being marginalised, as states will fall back on the expansive right of self-preservation and inevitably place their own survival above adherence to an international law system that cannot guarantee their security and the safety of their citizens. The signs from the UN are good, patience and support for its efforts is what is needed.

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<sup>58</sup> Ibid 259.

<sup>59</sup> Ibid.

<sup>60</sup> Blakesley, 'Ruminations on Terrorism', above n 20, 1080.

<sup>61</sup> McLain, 'Settling the Score with Saddam', above n 42, 291.